4. CHANGES AND EXPANSIONS OF "GRANDFATHERED" USES. (or: "Old Man, New Tricks']

4-A. ***THE NEW LONDON LAND USE CASE.***

The case *of New London Land Use Assn. v. New London ZBA,* 130 N.H. 510 (1988) still provides the best summary our NH Supreme Court has given us of the legal rules for when a nonconforming use can be changed or expanded. Lakeside Lodge owned a motel consisting of 17 housekeeping collages. This density was roughly double the density permitted by zoning and therefore was a nonconforming use. The motel was also a nonconforming commercial use in a residential district. Lakeside wanted a special exception to construct a 17-unit condominium development, consisting of entirely new buildings with about double the total floorspace of the existing motel. The issue was whether Lakeside could use its nonconforming density (17 units) for the new development. The Court said no.

> **"Nonconforming uses may be expanded, where the expansion is a natural activity, closely related to the manner in which a piece of property is used at the time of the enactment of the ordinance... However, enlargement or expansion may not be substantial and may not render premises or property proportionally less adequate...**
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> **"We must also consider the extent to which the challenged use reflects the nature and purpose of the prevailing nonconforming use, whether the challenged use is merely a different manner of using the original nonconforming use or whether it constitutes a different use, and whether the challenged use will have a substantially different impact upon the neighborhood..."** (130 N.H. 516-17, citations omitted)

Runs With The Land: The Court said nonconforming uses may be passed to subsequent owners, and that a change from tenant occupancy to owner occupancy is not, in and of itself, an extension or expansion of a nonconforming use.

WHAT IS THE NONCONFORMING USE? Dissent's view*:* C.J. Brock, in his dissent in the New London case, said there were two nonconforming uses: the commercial nonconformity and the density nonconformity. In his view, Lakeside had a vested right to continue with the nonconforming density, even in the new project, since the number of units wasn't going to expand. ***Majority view****:* To the majority, however, the relevant question was this: At the time of the adoption of the ordinance, what did the owner have an investment-backed expectation of? The answer is "a seventeen-unit motel on a seventeen-acre parcel," not an abstract interest in the number seventeen:

> **"Absent a willing relinquishment of its nonconforming use, Lakeside may not substantially change the way in which the motel units were situated on the seventeen-acre parcel when the nonconforming use was created... The changes which Lakeside proposes are not required for, nor are they reasonably related to, the continuation of the use that existed at the time the zoning ordinance was passed."** (130 N.H. at 517, emphasis added)

In other words, a "nonconforming use" is the use ***as a whole,*** and the effect of that use as a whole can't be adequately analyzed by dividing it into its constituent elements.

SUMMARY OF* NEW LONDON *TESTS FOR LEGALITY OF CHANGES IN NONCONFORMING USES:

> **(A). Does the proposed change arise "naturally" (through evolution, such as new and better technology) out of the "grandfathered" use;**
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> **(B) Is it required for the purpose of making the existing use more available to the owner; or does it constitute a new and different use (in which case all grandfathered rights must be relinquished)?**
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> **(C). Will the change or expansion render the premises proportionally less adequate for the use, in terms of the requirements of the ordinance? [This is an especially important test for dimensional nonconformities; see § 8 below.]**
>
> **(D) Will the change or expansion have a substantially different impact on abutting property or the neighborhood?**

The owner must carry the burden on ***all*** of these questions in order for any change or expansion of a "grandfathered" use to occur.

Remember The Purpose Of These Tests! The tests for changes and expansions of nonconforming uses, as set forth in the *New London* case, are ***not*** to gauge the community impact of the nonconforming use or structure. On the contrary, the test is based on the assumption that ***all*** nonconformities have a negative impact because they violate the Ordinance. The Court said: **"The ultimate purpose of zoning regulations contemplates that nonconforming uses should be reduced to conformity as completely and rapidly as possible."** Instead, the purpose of the tests is to determine whether, despite that presumed negative impact, the proposed change or expansion is constitutionally protected because it is within the vested rights (investment-backed reliance) represented by what existed before the ordinance took effect. That takes looking at the pre-existing use ***as a whole***, and not just at the portion actually violating the Ordinance.

Notice also that the last prong of the test is only whether the change or expansion will have "a substantially different impact. ***It doesn't matter whether that impact is better or worse***. The word "adverse" appears nowhere in the test! Again, the purpose of the test is not to measure adversity or impact. The purpose is instead to measure how ***different*** the new proposal is from the vested, pre-existing use. "**A substantial change in the nature and purpose...will be prohibited, even if the proposed use is less offensive than the original use."** (Peter Loughlin: 15 N.H. PRACTICE, LAND USE PLANNING AND ZONING at Section 8.06, quoting *Stevens v. Town of Rye*, 122 N.H. 688 (1982)). Again, your mindset should be that ***all*** nonconformities are adverse and should be eliminated. The *New London* tests only protect those uses or structures which must nevertheless be allowed, because they are part of a justified investment-backed expectation pre-dating the ordinance.